Filed 6/19/12

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| GEORGE RICKARDS,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>UNITED PARCEL SERVICE, INC. et al.,<br><br>Defendants and Respondents. | B234192<br><br>(Los Angeles County Super. Ct. No. BC441150) |

APPEAL from judgment and order of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Shegerian & Associates, Inc., Carney R. Shegerian, for Plaintiff and Appellant.

Paul Hastings, George W. Abele, Michele A. Freedenthal, and Kelly Hsu, for Defendant and Respondent United Parcel Service, Inc.

Ross & Silverman and Melanie C. Ross, for Defendant and Respondent Bob Esqueda.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for partial publication with the exception of the Factual and Procedural Summary and sections I-*C.* and II of the Discussion.

Appellant George Rickards sued respondent United Parcel Service, Inc. (UPS) for violating the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). The trial court granted UPS's summary judgment motion on the sole ground that Rickards did not file a verified complaint with the Department of Fair Employment and Housing (DFEH) and thus failed to satisfy this jurisdictional prerequisite for filing a lawsuit under FEHA (Gov. Code, § 12960, subd. (b)). In the published portion of this opinion, we conclude that the complaint Rickards' attorney filed through DFEH's online automated system was sufficient under FEHA. In the unpublished portion of the opinion, we affirm the summary judgment because Rickards failed to raise a triable issue of material fact on his FEHA claims against UPS. We also conclude in the unpublished portion of the opinion that the trial court did not abuse its discretion in awarding respondent Bob Esqueda $40,000 in attorney fees upon granting Esqueda's unopposed summary judgment motion and finding that Richards' refusal to dismiss the age and disability harassment claims against Esqueda was unreasonable.

## FACTUAL AND PROCEDURAL SUMMARY

Rickards worked as a full-time package driver for UPS. On March 18, 2008, he was diagnosed with a lumbar sprain and a muscle spasm after injuring his back on the job. He was released back to work with the medical restriction that his daily shift be limited to eight hours. Two days later, on March 20, the restriction was changed to no lifting, pulling or pushing more than 10 pounds.

According to Rickards, Esqueda, who managed the UPS center where Rickards worked, reacted angrily when he learned of Rickards' back injury and did not take him to see a doctor immediately. He insisted that Rickards take online safety tests first. Esqueda did not comply with Rickards' medical restrictions, assigning him to long routes and to a pre-load shift at 3:30 a.m. that required lifting packages. Rickards overheard Esqueda telling someone in the UPS human resources office that Rickards was feigning his injury and making a false worker's compensation claim, and that Esqueda wanted to fire him. Esqueda also told Rickards he could not work as a driver any longer and

offered to transfer him to another position within the company. When Rickards refused to sign the paperwork, Esqueda placed him on a worker's compensation leave of absence from March 21 to April 10. On April 10, Rickards returned to work in his regular position with no restrictions.

After Rickards returned from his leave of absence, his truck was audited daily for at least a month or two. Supervisor Lam Phaykaisorn followed him five or six times over a few weeks looking for infractions, and Rickards was written up for not wearing a seat belt, not closing his truck door, calling in sick, and misdelivering a package. He was assigned extra work and had to work longer shifts.[1]

More than a year later, on the morning of August 28, 2009, Rickards received an award for 20 years of safe driving. That same morning, he asked Phaykaisorn, his acting on-road supervisor for the day, to relieve him of some of the delivery stops at schools on his route because they interfered with the number of stops per hour he was expected to make. Phaykaisorn refused to do so and ordered Rickards to start his route.

Instead, Rickards went to the company office to check on his new uniform. He was talking to another driver when Phaykaisorn came into the office and confronted him about not having left for his route. Rickards headed toward his truck and did not stop when Phaykaisorn called him back into the office. Raising his voice, Phaykaisorn followed Rickards, got in front of him, and placed a hand on Rickards' chest to stop him. In response, Rickards told Phaykaisorn, "Get out of my face or I'll hit you." Rickards agreed to return to the office after Phaykaisorn threatened to fire him if he drove off.

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[1] On March 5, 2008, two weeks before his back injury, Rickards already had filed a grievance against Esqueda and Phaykaisorn, requesting that they "stop any future harassment and threats." At his deposition, Rickards explained that he filed the grievance because they had been following him, giving him extra work, and auditing his truck. Specifically, Rickards claimed he felt threatened during an incident when Esqueda and Phaykaisorn opened Rickards' locked truck and took out his computer board. When confronted, Esqueda told Rickards, "You'll trip up so many times I'll have you fired in two weeks." A few days later, Rickards was written up for "unprofessional conduct" for using profanity during this incident.

Esqueda interviewed Rickards and Phaykaisorn about the incident and terminated Rickards for unprofessional conduct and unprovoked assault on a supervisor. Rickards' grievance of his termination was arbitrated, and on December 12, 2009, the arbitrator found that UPS had had just cause to terminate him.

On February 26, 2010, Rickards' attorney filed a FEHA complaint on Rickards' behalf through DFEH's automated online system. The system required that information be verified under penalty of perjury but did not require an actual signature. Rickards' attorney clicked the "CONTINUE" prompt on a screen containing a declaration under penalty of perjury about the truth of the complaint he was submitting. As we explain later, he thus verified the complaint. DFEH's automated system issued an automatic right-to-sue letter.

Rickards then filed a lawsuit against UPS, Esqueda, and Doug Sherman (his regular on-road supervisor), alleging six causes of action under FEHA: (1) disability discrimination, (2) age discrimination, (3) harassment on the basis of disability, (4) harassment on the basis of age, (5) retaliation for complaining about disability discrimination and harassment, and (6) retaliation for complaining about age discrimination and harassment. The individual defendants were named on the causes of actions for harassment based on disability and age. Sherman was dismissed from the suit in December 2010.

In January 2011, Esqueda's counsel demanded that Rickards dismiss Esqueda because Esqueda's personnel management actions were not evidence of harassment. She received no immediate response. In February, UPS and Esqueda filed separate summary judgment motions. In April, Rickards' counsel conditioned Esqueda's dismissal on a waiver of fees and costs and an agreement from UPS that the case would not be removed to federal court. UPS did not agree to the latter condition, and Esqueda was not dismissed from the suit. The court granted Esqueda's unopposed summary judgment motion. Esqueda then filed a motion for attorney fees, which Rickards opposed. The court awarded Esqueda fees in the amount of $40,000, finding that the lawsuit against

him was groundless and unreasonable and was maintained in subjective bad faith to avoid removal of the lawsuit against UPS to federal court.

The court granted summary judgment for UPS based on Rickards' failure to file a verified DFEH complaint. After his motion for a new trial against UPS was denied, Rickards appealed from the judgment in favor of UPS, the order denying his motion for a new trial, and the order awarding attorney fees to Esqueda.

## DISCUSSION

### I

*A. Standard of Review*

Summary judgment is proper when no triable issue exists as to any material fact, and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A moving defendant meets its burden by showing one or more essential elements of the cause of action cannot be established, or by establishing a complete defense to the cause of action. (*Id*., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) The burden then shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action or defense. (*Ibid.*; Code Civ. Proc., § 437c, subd. (p)(2).)

We review the trial court's decision on a summary judgment motion de novo, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) We consider all of the evidence the parties offered in connection with the motion, except that which the court properly excluded. (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476.) If the trial court did not expressly rule on specific evidentiary objections, "it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the

summary judgment motion, and the objections are preserved on appeal." (*Reid v. Google, Inc*. (2010) 50 Cal.4th 512, 534 (*Reid*).)[2]

*B. The DFEH Complaint*

The trial court granted UPS's summary judgment motion on the ground that Rickards' failure to file a verified DFEH complaint was a jurisdictional defect. It is undisputed that Rickards' attorney filed a form complaint through DFEH's automated online system on Rickards' behalf and received an immediate right-to-sue letter. At his deposition, Rickards testified he did not know anything about the DFEH complaint. In declarations, Rickards and his attorney stated that the attorney was authorized to file the complaint on Rickards' behalf. The parties disagree whether the complaint was properly verified under the circumstances. We conclude that it was.

Before suing under FEHA, a plaintiff must exhaust his or her administrative remedies by filing a verified complaint with the DFEH and obtaining a right-to-sue letter. (*Blum v. Superior Court* (2006) 141 Cal.App.4th 418, 422 (*Blum*); Gov. Code, §§ 12960, subd. (b), 12965, subd. (b).) Specifically, Government Code section 12960, subdivision (b) provides: "Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department."

The question of who may verify a DFEH complaint was addressed in *Blum*, *supra*, 141 Cal.App.4th 418. The DFEH form complaint filed on the plaintiff's behalf in that case contained the following printed statement: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge except as to matters stated on my information and belief, and as to those matter[s] I believe it to be true." (*Id*. at p. 425.) The form contained a line for

[2] The trial court did not rule on the parties' evidentiary objections, but no one argues on appeal that any of the evidentiary objections should have been sustained.

"COMPLAINANT'S SIGNATURE." (*Ibid.*) The attorney subscribed his own name and wrote beneath the signature line, "LAW OFFICES OF MARK WEIDMANN ON BEHALF OF BARRY BLUM." (*Ibid.*)

The *Blum* court reasoned that Government Code section 12960, subdivision (b) does not expressly require that the complainant personally verify the information in the complaint, nor does DFEH require complaints to be filed only on personal knowledge. (*Blum*, *supra*, 141 Cal.App.4th at pp. 422, 425.) It approved the practice of attorney verification of a DFEH complaint for a client, so long as the attorney signs the complaint with his or her own name, rather than the client's name. (*Id.* at p. 428.) The court cautioned attorneys "about verifying such complaints unless they believe the allegations made therein to be true and they are acting in good faith as they are subject to penalties for perjury if they sign their name to DFEH complaints." (*Ibid.*)

In 2008, DFEH announced its online automated system for issuing right-to-sue letters, "designed for complainants with private counsel who wish to proceed directly to court on employment discrimination, harassment and retaliation complaints."[3] The automated system required input of the name of the complainant, address, telephone number, as well as information about the employer and other defendants. A screen titled "Signing under Penalty of Perjury" contained the statement, "[b]y submitting this complaint, I am declaring under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge except as to matters stated on my information and belief, and as to those matters I believe it to be true." Rickards' attorney clicked "CONTINUE" on this screen. The same declaration appeared on the electronically generated complaint that the attorney printed out. The automated system did not prompt input of the attorney's name on the complaint, nor did it provide for a physical signature.

With the exception of the introductory phrase, "[b]y submitting this complaint I am declaring," the declaration on the electronically filed complaint in this case was the

[3] The evidence and arguments regarding DFEH's online automated complaint system were first presented in relation to Rickards' motion for a new trial.

same as the one printed on the paper form used in *Blum*. But unlike the paper complaint in *Blum*, the online complaint did not have a line for "COMPLAINANT'S SIGNATURE."

In 2010, DFEH proposed regulations designed to replace its procedures of general application for processing discrimination complaints, known as DFEH Directives. (California Reg. Notice Register 2010, No. 8-Z, pp. 269–270.) The regulations became effective in 2011. Several of them make clear that an online verified complaint need not be signed. (Cal. Code Regs., tit. 2, §§ 10001(u) ["'Verified complaint' means a complaint submitted to the department with the complainant's oath or affidavit stating that to the best of his or her knowledge, all information contained in the complaint is true and correct, except matters stated on information and belief, which the complainant declares he or she believes to be true. To be 'verified' a complaint filed with the department need not be signed; verification need only confirm the truth of the allegations submitted, including by submitting the allegations under penalty of perjury"]; 10002(a)(9) ["complaints filed electronically need not be signed; complaints filed electronically shall state that by submitting the complaint, the complainant declares under penalty of perjury under the laws of the State of California that to the best of his or her knowledge, all information stated in the complaint is true and correct, except matters stated on information and belief, which the complainant declares he or she believes to be true"]; 10005(d)(9) [same].)

UPS does not challenge the holding in *Blum*, the validity of DFEH's online complaint procedure, or the 2011 regulations. It only argues the regulations do not dispense with the requirement that an attorney may verify a DFEH complaint only by signing his or her own name, and if the regulations do dispense with the signature requirement for online complaints, they do not apply retroactively. The 2011 regulations confirm what DFEH's automated system for online complaints has permitted since 2008—that verification of online complaints is permissible without a physical signature. Under *Blum*, attorneys may verify DFEH complaints so long as they personally are subject to penalties for perjury. (*Blum*, *supra*, 141 Cal.App.4th at p. 428.) Since online

complaints were not at issue in that case, the court did not address how an attorney goes about verifying such a complaint.

Under the Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.), an electronic record satisfies the requirement that a record be in writing. (*Id.*, § 1633.7, subd. (c).) "An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner . . . ." (*Id.*, § 1633.9, subd. (a).) In the same way, the attorney's verification of an online complaint is the act of the attorney.

The instructions on DFEH's automated system make clear that requests for an immediate right-to-sue letter are accepted from complainants who have decided to go directly to court without an investigation by DFEH, and such a decision is advisable only if the complainant has an attorney. The right-to-sue letter that can be immediately printed after inputting information into the automated system is accompanied by a notice to complainant's attorney. Since the system is essentially intended to be used by complainants who have counsel, such complainants should not be penalized for retaining counsel. (*Blum*, *supra*, 141 Cal.App.4th at p. 428.)[4]

We conclude that the attorney verification of the online DFEH complaint in this case was sufficient. UPS is not entitled to summary judgment on the ground that Rickards failed to fulfill a jurisdictional prerequisite to filing a FEHA lawsuit.

*C. The FEHA Disability Claims*

Although we disagree with the trial court's stated reason for granting UPS's summary judgment motion, we may affirm the summary judgment if it is correct on any ground properly offered in the trial court, regardless of the reasons stated by the court in its ruling. (*Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1261.)

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[4] We suggest that, to remove any confusion, DFEH consider modifying its automated system to allow input of the name of complainant's counsel on the online form complaint.

Code of Civil Procedure section 437c, subdivision (m)(2) provides: "Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs." In this case, the parties have fully briefed the merits of the summary judgment in the trial court and on appeal. Supplemental briefing is not required. (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1175, fn. 16.)

Rickards did not oppose UPS's summary judgment motion as to his three age-related claims. The question on appeal comes down to whether there is a triable issue of material fact as to any of his disability-related claims: disability discrimination, retaliation for complaining about disability discrimination and harassment, and harassment based on disability. We conclude that there is not.

*1. Disability Discrimination*

Employment discrimination claims under FEHA are subject to a three-step burden-shifting analysis. (*Guz v. Bechtel Nat. Inc*. (2000) 24 Cal.4th 317, 355 (*Guz*).) The employee must first make a prima facie case of wrongful discrimination. (*Id*. at pp. 354–355.) The burden then shifts to the employer to rebut the prima facie case by producing admissible evidence that its action was taken for a legitimate, nondiscriminatory reason. (*Id*. at pp. 355–356.) It then shifts back to the employee to raise a triable issue of material fact that the employer's proffered reason was pretextual. (*Id*. at p. 356.)

FEHA prohibits discharge or discrimination of any person on account of physical disability. (Gov. Code, § 12940, subd. (a).) A prima facie case for disability discrimination requires the plaintiff to show that he or she suffers from a disability, is otherwise qualified to do the job, and suffered an adverse employment action because of the disability. (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886.)

UPS argues that at the time of his termination Rickards was not disabled. Physical disability under FEHA includes a physiological condition that affects the musculoskeletal

body system and limits a major life activity, including working. (Gov. Code, § 12926, subd. (k)(1)(A), (B).)[5] Disability also includes "[h]aving a record or history" of such a condition, "which is known to the employer." (*Id*., § 12926, subd. (k)(3).) In the trial court, Rickards claimed that he was disabled and had a record of disability. He repeats that claim on appeal. But his own testimony indicates that after April 10, 2008, he returned to work with no restrictions and was able to perform all his job duties until his termination. We have been cited to no evidence indicating he had any existing disability in August 2009.

Neither side has adequately addressed whether Rickards was disabled between March 18 and April 10, 2008, in order to claim that he had a record or history of disability. UPS exclusively relies on *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327 (*Arteaga*). The employee in that case was diagnosed with carpal tunnel syndrome only after he was discharged by his employer. (*Id*. at p. 349.) While employed, he had been given a clean bill of health with no restrictions. (*Id*. at p. 347.) In contrast, the evidence here indicates that Rickards was diagnosed with a lumbar sprain and placed under medical restrictions, of which UPS was aware. A temporary, non-chronic condition may be a disability under FEHA. (See *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1249, fn. 5.) Assuming that this showing is sufficient to raise an issue of material fact whether Rickards had a record of previous disability, the question is whether Rickards was terminated because of it.

Rickards argues that he has direct evidence of Esqueda's discriminatory animus, claiming Esqueda wanted to fire him because of his medical restrictions. The record indicates that this claim is based on comments Esqueda made more than a year before Rickards was terminated. Rickards testified that, during the time when he was under actual medical restrictions, he overheard Esqueda saying that Rickards was feigning

[5] Effective January 1, 2012, Government Code section 12926, subdivision (k) has been redesignated subdivision (l).

injury and that Esqueda wanted to fire him.[6] Around the same time, Esqueda said Rickards could not do his job. Esqueda's alleged comments were made before April 10, 2008. Since they were not made in the context of Rickards' actual termination in August 2009, more than a year later, they are not evidence that Rickards was terminated because of a disability he no longer had.

Comments made by a decisionmaker outside of the decisional process are known as "stray remarks." (*Reid*, *supra*, 50 Cal.4th at p. 537.) "Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered." (*Id*. at p. 541.)

Considering Esqueda's remarks in the context of the record, we note that Esqueda's conduct between March 18 and March 20, 2008 is Rickards' only evidence of disability discrimination. Rickards worked at UPS for more than a year after April 10, 2008 with no medical restrictions and no actual disability. He has identified no disability-related comments after his return to work or in relation to his termination. Temporal proximity between a disclosure of a medical condition and a subsequent termination may satisfy the employee's prima facie causation requirement. (*Arteaga*, *supra*, 163 Cal.App.4th at p. 353.) But there is no such temporal proximity between Rickards' back injury and his termination. Esqueda's 2008 remarks, when viewed in the context of the entire record, do not corroborate the claim of disability-based discrimination or gain significance in conjunction with other circumstantial evidence. Rickards has thus failed to raise a triable issue of material fact that he was terminated because of a disability.

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[6] Rickards also relies on his declaration that, "[a]round the time" of Rickards' back injury, Esqueda threatened to have Rickards fired within two weeks. The record indicates that this threat preceded the back injury.

In addition, UPS has identified a legitimate reason for Rickards' termination—his threat to hit a supervisor. Misconduct involving a threat against a coworker is a legitimate, nondiscriminatory reason for terminating an employee. (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 168.) This satisfies the second step of the burden-shifting analysis.

Under the third step, Rickards has failed to raise an issue of material fact that the proffered reason for his termination was pretextual. Rickards insists that during their August 2009 argument Phaykaisorn provoked him by stepping in front of him and placing his hands on Rickards' chest. Rickards argues that Esqueda failed to adequately investigate because he did not speak to a driver who witnessed part of the incident. But the record does not show that the witness saw the relevant part of the incident or had any exculpatory information. Rickards' own declaration indicates that Esqueda interviewed both him and Phaykaisorn and chose to side with Phaykaisorn because "he had to 'support' his 'management team.'" Esqueda was not required to adopt Rickards' subjective perception that Phaykaisorn's actions amounted to provocation, and Esqueda's reason for terminating Rickards "need not necessarily have been wise or correct." (*Guz, supra*, 24 Cal.4th at p. 358.)

Rickards contends that UPS gave inconsistent or contradictory reasons for his termination because Esqueda identified an additional reason for terminating Rickards–his use of profanity in prior incidents. The discharge form cited unprofessional conduct in addition to the assault on the supervisor, and Rickards had been written up for unprofessional conduct for using profanity in the past. This additional reason for his termination does not establish pretext since it does not contradict or make less credible the main reason cited on the discharge form—Rickards' threat to hit a supervisor. (See *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 [to be pretextual, employer's reasons must be so weak, contradictory, inconsistent, or implausible as to be "unworthy of credence"].) Rickards claims that termination was a grossly disproportionate punishment in light of his 20-year employment with UPS. But termination based on threats of violence is legitimate and not discriminatory. (*Wills v.*

*Superior Court*, *supra*, 195 Cal.App.4th at p. 168.) And in this case, termination for an unprovoked assault on a supervisor was indisputably appropriate under Rickards' union contract.

The claim that disability discrimination was a likely basis for Rickards' discharge is speculative, and UPS has presented a legitimate reason for his termination. Rickards has failed to raise a triable issue that UPS's proffered reason was pretextual. UPS is therefore entitled to summary judgment on this claim.

*2. Retaliation*

Retaliation claims under FEHA are subject to the same burden-shifting analysis as discrimination claims. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) The employee must first establish a prima facie case of retaliation by showing "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.]" (*Ibid*.)

Government Code, section 12940, subdivision (h) provides that retaliation claims can be based on the employee's opposition to any practice forbidden under FEHA. A causal link may be established with evidence of the employer's knowledge that the employee engaged in a protected activity and the proximity in time between that activity and the allegedly retaliatory employment action. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.) Conversely, a lack of proximity may support an inference that the two events are not causally linked, unless the employer's pattern of conduct is consistent with a retaliatory intent. (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 421.)

Rickards claims to have engaged in protected activity when he complained about "various problems he had at work with Esqueda and Phaykaisorn, such as his increased hours, despite his restrictions." The record indicates that Rickards was under medical restrictions that limited his shift to eight hours on March 18 and 19, 2008. He claims to have voiced concerns about his workload in light of this restriction to Esqueda himself and to Phaykaisorn. Assuming that Esqueda failed to reasonably accommodate Rickards'

medical restrictions in violation of FEHA (Gov. Code, § 12940, subd. (m)), Rickards has raised an issue of material fact that he engaged in a protected activity when he complained about his hours on the days when the restrictions were in place. But his continuous complaints about his hours or his general problems with Esqueda and Phaykaisorn, both before his injury and after his return to work with no restrictions, were not protected activities under FEHA unless Rickards apprised UPS of his belief that he was treated unfairly for a prohibited reason. (See *Yanowitz, supra*, 36 Cal.4th at 1046 [no protected conduct without evidence employer knew employee's opposition based on reasonable belief employer was violating FEHA].) We have been cited to no such evidence.

Because Rickards' only protected activity occurred in March 2008 and he was not terminated until August 2009, the causal connection between these events is tenuous. Rickards claims that his supervisors retaliated against him in the meantime by following his truck and writing him up, or subjecting him to daily audits. His own testimony indicates that this conduct occurred in the months immediately after his return to work in April 2008. We are cited to no evidence that the daily audits, surveillance of his truck, or unfair write-ups continued through 2009 in order to establish any systematic pattern of retaliatory conduct leading up to his termination. Nor are Rickards' long-standing complaints about his workload and hours such evidence. Even before he was injured, Rickards already had filed a grievance based on many of the same managerial actions about which he later continued to complain. He admitted that a number of drivers complained about having to work longer shifts, and that these drivers were targeted for supervisor ride-alongs.

If Rickards had established a prima facie case of retaliation, it would take him to the second and third steps of the same burden-shifting analysis that applies to his disability discrimination claim. As to that, we have concluded that he did not raise a triable issue of material fact that UPS's proffered legitimate reason for his termination was pretextual.

*3. Disability Harassment*

Government Code section 12940, subdivision (j)(1) prohibits harassment of an employee based on a physical disability or a medical condition. "[H]arassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 706 (*Roby*).) Because harassment is generally concerned with the message conveyed to an employee, "in some cases, the hostile message that constitutes the harassment is conveyed through official employment actions, and therefore evidence that would otherwise be associated with a discrimination claim can form the basis of a harassment claim." (*Id*. at p. 708.) Relying on *Roby*, Rickards contends that all management actions that he found objectionable after his return to work constituted harassment based on disability because Esqueda already had exhibited discriminatory bias for wanting to fire Rickards after his back injury.

*Roby* is distinguishable. The employee in that case was frequently and unexpectedly absent due to panic attacks. (*Roby*, *supra*, 47 Cal.4th at p. 694.) She also suffered from excessive sweating, an unpleasant body odor caused by medication, and a concomitant nervous disorder that caused her to dig her fingernails into her skin, leaving open sores on her arms. (*Id*. at p. 695.) Her supervisor made daily negative comments about her condition, shunned her in the office and at social gatherings, belittled and reprimanded her in front of others. (*Ibid*.) The employee eventually was terminated for absenteeism under the company's attendance policy, even though her supervisor was aware of her medical condition. (*Id*. at p. 696.) The Supreme Court held that the supervisor's actions may have contributed to the hostile message that she was expressing explicitly on a daily basis. The supervisor's hostility also could be inferred from her discriminatory application of the company's absence policy without regard for accommodating the employee's known medical condition. (*Id*. at pp. 710–711.)

The evidence of the supervisor's express hostility based on the employee's medical condition in *Roby* was pervasive. The same hostility was clearly implicated in

the discriminatory reason for the employee's termination. In contrast, Rickards was terminated for a legitimate reason that had nothing to do with his earlier back injury. Thus, his termination did not amount to a hostile message. The evidence of any allegedly hostile messages based on disability is limited to three days in March 2008, a time outside the one-year statutory period under Government Code section 12960, subdivision (d). (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1040.) Liability cannot be based on such evidence unless conduct sufficiently similar in kind occurred within the statutory period in order to bring Rickards' claims under the continuing violation doctrine. (*Id*. at p. 1041.)

In a conclusory fashion, Rickards claims that doctrine applies in this case. But he cites no evidence that conduct sufficiently similar to Esqueda's express hostility to Rickards' claim of injury and medical restrictions occurred any time after March 20, 2008, or within a year of his February 2010 DFEH complaint. Under *Roby*, personnel management actions must be relevant to prove the communication of a hostile message based on disability. (*Roby*, *supra*, 47 Cal.4th at p. 708.) The personnel management actions in this case, even if perceived as unfair by Rickards, sent no particular hostile message based on a disability.

UPS is entitled to summary judgment on the disability harassment claim.

II

Government Code section 12965, subdivision (b) authorizes an award of reasonable attorney fees and costs to the prevailing party in a FEHA case. A trial court has discretion to award attorney fees to a prevailing defendant in such a case only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387 (*Cummings*), quoting *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421 (*Christiansburg*).) "[I]f a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." (*Christiansburg*, at p. 422.) In awarding fees, the court must consider the plaintiff's ability to pay.

(*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1202–1203 (*Villanueva*).) The award is reviewed for abuse of discretion. (*Cummings*, at p. 1387.)

The trial court found that the harassment claims against Esqueda were groundless and unreasonable and that Esqueda was kept in the case in bad faith to avoid removal to the federal court. The court considered Rickards' claim that he could not afford to pay attorney fees but was not persuaded because Rickards had been warned that he might be liable for fees. The court awarded $40,000 in attorney fees, incurred after the January 2011 written demand for Esqueda's dismissal.

Rickards does not attempt to justify the age-related harassment claim against Esqueda, but he argues that the disability harassment claim against Esqueda was warranted. Under Government Code section 12940, subdivision (j)(3), Esqueda may have been personally liable for any prohibited harassment he perpetrated, but he was not personally liable for discrimination or retaliation. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1164, 1167.) As we already explained, Rickards has proffered no evidence of disability-based harassment in the statutory period and no evidence of a continuing violation.

The lack of merit of the harassment claims was made clear by Esqueda's counsel in her January 2011 letter, in which she summarized Rickards' deposition testimony and demanded Esqueda's dismissal. Esqueda's counsel warned that otherwise she would file a summary judgment motion and seek attorney fees and costs under FEHA. In response, Rickards' counsel conditioned Esqueda's dismissal on an agreement by UPS that the case remain in state court. Rickards neither dismissed Esqueda nor opposed his summary judgment motion. In opposition to the motion for attorney fees, Rickards presented a declaration that his monthly gross income was $3,480, his monthly mortgage payment was $1,400, his family's monthly living expenses were $600, and he was $20,000 in debt.

We find no abuse of discretion in the trial court's decision to award Esqueda attorney fees incurred after the January 2011 letter. The letter placed Rickards on notice that he could be liable for attorney fees for continuing to prosecute what was clearly a frivolous lawsuit against Esqueda. The condition Rickards' counsel placed on Esqueda's

dismissal—that UPS agree not to transfer the case to federal court—supports the inference that Esqueda was kept in the case as an individual defendant solely for tactical reasons and without regard to the merits of the claims against him.[7]

Esqueda requests that we consider holding Rickards' attorney of record jointly liable for the fee award on the ground that the decision not to dismiss Rickards was probably that of counsel. We cannot do so since the motion for attorney fees under FEHA was filed only against Rickards. In a footnote, the brief accompanying the motion asked the trial court to consider sanctioning Rickards' counsel sua sponte under Code of Civil Procedure section 128.7, subdivision (c)(2). The trial court did not address this request, but the safe harbor provisions in that section preclude the court from initiating sanctions on its own motion after rendering a dispositive ruling on a challenged pleading. (*Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 444.)

The issue of counsel's liability for fees under FEHA was not raised at all, and Esqueda cites no authority that fees can be assessed against Rickards' counsel. In *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, on which Esqueda incorrectly relies, the court did not suggest that attorney fees under FEHA should run jointly against

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[7] Rickards argues that the claim against Esqueda must be evaluated together with his claims against UPS. He relies on caselaw holding that the frivolousness of claims under FEHA must be determined in relation to non-FEHA legal theories asserted in the complaint. (See e.g. *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 832.) He cites no authority for the proposition that the claims against all defendants must be found frivolous, unreasonable, or without foundation if only one defendant seeks attorney fees under FEHA. Rickards notes in passing that Esqueda's attorney fees have been paid by UPS, but makes no argument regarding the materiality of this fact.

In *Young v. Exxon Mobil Corp.* (2008) 168 Cal.App.4th 1467, the employee sued a supervisor along with the employer. The employer's counsel represented the supervisor, who then sought an award of attorney fees under FEHA that would benefit the employer. (*Id*. at p. 1473.) Under the circumstances, the denial of attorney fees was held not to be an abuse of discretion because the employer did not seek attorney fees and "did not show it incurred any significant fees on [the supervisor]'s behalf that it would not have incurred in any event . . . ." (*Id*. at p. 1477.) Here, in contrast, Esqueda was represented by separate counsel and was liable for his counsel's attorney fees if UPS did not pay them. Thus, the fees paid to Esqueda's counsel were in addition to fees UPS incurred in its own defense.

counsel. It only noted that sanctions for filing a frivolous appeal could be requested or granted against counsel sua sponte. (*Id*. at p. 1111.) The court considered whether to initiate sanctions against the plaintiff's counsel for various transgressions on appeal but ultimately declined to do so. (*Id*. at p. 1127.) Sanctions on appeal are governed by California Rules of Court, rule 8.276. Esqueda has not filed a motion for sanctions under this rule, and we decline to initiate sanctions on our own motion.

## DISPOSITION

The summary judgment in favor of UPS and the order awarding Esqueda attorney fees are affirmed. Esqueda is entitled to his costs on appeal. Rickards and UPS are to bear their own costs.

**CERTIFIED FOR PARTIAL PUBLICATION**

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.